No. 9790.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE T. GOGGIN, Trustee in Bankruptcy of the Estate of Jack Dave Sterling, Bankrupt,

Appellant,

vs.

BOLSA CHICA OIL CORPORATION, a corporation, THOS. W. SIMMONS, ALLAN A. ANDERSON, WILLIAM H. CREE, H. H. MCVICAR, C. M. ROOD, and M. M. MCCALLEN CORPORATION, a corporation,

Appellees.

BRIEF OF APPELLEES BOLSA CHICA OIL CORPORATION, THOS. W. SIMMONS AND ALLAN A. ANDERSON.

EUGENE OVERTON,
WARREN S. PALLETTE,
DONALD H. FORD,
733 Roosevelt Building, Los Angeles,

Attorneys for Appellees, Bolsa Chica Oil Corporation, Thos. W. Simmons, and Allan A. Anderson.

Parker & Baird Company, Law Printers, Los Angeles.

TOPICAL INDEX.

TABLE OF AUTHORITIES CITED.

CASES. PAGE

STATUTES.

TEXTBOOKS. PAGE

No. 9790.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE T. GOGGIN, Trustee in Bankruptcy of the Estate of Jack Dave Sterling, Bankrupt,

Appellant,

vs.

BOLSA CHICA OIL CORPORATION, a corporation, THOS. W. SIMMONS, ALLAN A. ANDERSON, WILLIAM H. CREE, H. H. MCVICAR, C. M. ROOD, and M. M. MCCALLEN CORPORATION, a corporation,

Appellees.

BRIEF OF APPELLEES BOLSA CHICA OIL CORPORATION, THOS. W. SIMMONS AND ALLAN A. ANDERSON.

Jurisdiction.

The District Court was without jurisdiction to entertain this proceeding inasmuch as it is a court of limited jurisdiction and, sitting as a court of bankruptcy, cannot entertain an action of the character here involved. Our entire brief is devoted to this question.

Statement of the Case.

The appellant's statement of the case, pages 2, 3 and 4 of appellant's opening brief, is, in the main, correct. Appellees, however, wish to call the attention of the Court to the fact that the appearance of attorneys for Bolsa Chica Oil Corporation was special only [Tr. p. 92], and that the approval of the order of injunction by the appellee, Bolsa Chica Oil Corporation [Tr. p. 29] and the stipulation in open court by said appellee [Tr. p. 156] were both expressly subject to the objection to the jurisdiction of the Court. It should further be pointed out that the order of the district judge sustaining the objection of the appellees to the jurisdiction of the Court in no way finds that the attack is collateral, but, on the contrary, in his oral opinion the district judge expressly finds the attack to be direct. [Tr. p. 252.]

Statement of the History of the Case.

A great many of the matters contained in appellant's statement of the history of the case have no bearing upon the question of jurisdiction involved in this appeal in that they occurred after the injunction issued. They are derived from the certificate of contempt which was prepared by appellant and which, to a large extent, is not supported by the evidence adduced before the referee and, as a result, many of the statements have no support in fact. Much of the factual matter set forth has little, if any, bearing upon the matter at issue. In view of the fact that the district judge expressly refused to hear any evidence upon existence of a violation of the injunction, but merely heard argument on the question of jurisdiction, and examined the record of the proceedings prior to the issuance of the injunction

order, the facts occurring subsequent to the issuance of the injunctive order are not at issue in this proceeding. If they were, appellees are prepared to show from the production record of appellant's well subsequent to the replacing of the same on production that it has suffered no loss of production or damage other than the expense of replacing it upon production. Appellees dislike taking the time of the Court in a discussion of matters not directly before it, but feel that it is necessary, in view of the statements of appellant, to make a proper statement of the facts as disclosed by the record.

At the time of the institution of this proceeding appellant and appellee, Bolsa Chica Oil Corporation, were the operators, respectively, of two oil wells located at Huntington Beach, California, the tops of which oil wells were located on two separate parcels of property in the town of Huntington Beach some distance apart, both of said wells being bottomed beneath the ocean in property belonging to the State of California. [Tr. pp. 19, 44, 45, 101.] Both of said wells were operated under identical easements granted by the State of California permitting the operators to produce oil and gas from beneath the tideland. These easements give each operator a cylindrical easement, twenty-four (24) inches in diameter, through the land of the state, which easement is the only property right involved. [Tr. p. 117.] At the time of the institution of these proceedings, appellant's well was producing, but the well of Appellee, Bolsa Chica Oil Corporation, was off production due to its casing having collapsed. Both wells had produced for a number of years, both of them having been drilled prior to 1934. Each of them had been redrilled prior to this proceeding. At the time of the redrilling, referred to by appellant, of its well, it was re-

drilled in such a manner as to cause its course to come close to the location of the Bolsa Chica Oil Corporation well, which was then producing. No damage was caused by appellant to the Bolsa Chica Oil Corporation well at the time of the redrilling of appellant's well. The appellees' well subsequently went off production due to collapse of its casing, and, while Bolsa Chica Oil Corporation and its predecessor in interest had made no objection to the redrilling of appellant's well, appellant instituted this proceeding before the referee in an attempt to prohibit the redrilling of appellees' well, which attempt was successful, inasmuch as said well, due to the present proceeding, has never been completed, in spite of the expenditure of in excess of $45,000.00 by appellees in such attempt.

The redrilling operation undertaken by appellees, at all times after the injunction order was issued, was in accordance with the rules and regulations of the State of California, and expressly approved by the State of California, the owner of the property into which the two wells were drilled. Furthermore, the operations conducted by appellees were at no time contrary to the terms of the injunction made and entered by the referee, even assuming that such injunction order might have been valid. Appellant has not alleged or claimed that the appellees' well was drilled upon or collided with appellant's property or well. Appellant bases his case on the use of mud by appellees as the circulating medium. The use of mud in the redrilling of appellees' well is the customary procedure in Huntington Beach as well as elsewhere, and in accordance with the rules and regulations of the State of California, so long as such use is limited to areas above the oil bearing sands. Appellees obtained the consent of appellant's engineer to the use of mud as a circulating medium prior

to any use thereof. [Tr. p. 225.] After appellant's well was mudded off, on June 10, 1940, appellant's engineer expressly approved the continued use of mud in the cleaning out of appellees' well, and the continued use of mud in further redrilling operations of appellees' well from June 10, 1940, until July 18, 1940 [Tr. pp. 227, 195, 197], at which time appellees had drilled to the top of the oil sand and changed to oil as a circulating medium. [Tr. pp. 226, 227.] Appellees at no time improperly used mud when drilling in the oil sand, or at any time after the injunction, without the consent of appellant's authorized agent.

The redrilling of wells in Huntington Beach field is a common and usual practice and it is impossible to redrill such wells without using mud as the circulating medium. (In drilling an oil well, a fluid, usually special types of clay and water (mud) is circulated through the drill pipe for three reasons: (1) to remove from the hole the material cut by the drill; (2) to lubricate the drill pipe; and (3) to maintain a cap or weight to counter-balance the gas pressure in the formation. If a well is drilled close to a producing well, there is a possibility that the drilling mud may pass through the producing formations into the neighboring well. In this event, such neighboring well may temporarily be shut down while the mud is cleaned out, or such mud may be pumped out in the usual course of pumping operations.) Many such wells have been redrilled without damage to adjoining wells. The damage to appellant's well in this case was largely contributed to, if not wholly caused by, appellant's own actions in failing to

stop pumping its well during such time as appellees were drilling in the proximity of appellant's well. [Tr. p. 185.]

In the latter part of July, 1940, after appellee, Bolsa Chica Oil Corporation, had drilled several hundred feet into the oil sand and was about to complete its well, due to the condition of the structure and the use of oil as a circulating medium, the well caved in and it was, therefore, necessary, in order to complete the same, to back up, recommence drilling above the oil sand, and use mud as a circulating medium. [Tr. p. 231.] Appellees asked the permission of appellant's engineer, in accordance with the terms of the injunction, to change back to mud. This permission was refused. Rather than violate the injunction, even though it was believed to be void, appellee, Bolsa Chica Oil Corporation, sold the well to appellee, M. M. McCallen Corporation [Tr. p. 202], which thereupon took over the well and cleaned out and surveyed the well. M. M. McCallen Corporation conducted no drilling operations, although it did use mud to circulate the well while cleaning it out to its then bottom far above the oil sand and in surveying its course. These operations were suspended shortly after the service of the contempt citation and upon completion of surveying operations, and have not been recommenced.

The above facts, to the extent the Court cannot take judicial notice thereof, *People v. Associated Oil Co.*, 211 Cal. 93, 105; *Gilbreath v. States Oil Corp.* (C. C. A. 5th), 4 Fed. (2d) 232, are supported by the record, and this statement is made to disabuse the mind of the Court of the impression to be gained from appellant's statement of the history of the case that there was a violation of the injunction and an intentional disregard of the order of the referee.

Questions Involved in This Appeal

1. Does a referee in bankruptcy have the power to enjoin, in a summary proceeding, without consent, or at all, the drilling of an oil well in a lawful manner without negligence by and on property of a third person, a stranger to the bankruptcy proceeding?

2. May not the invalidity of the order of injunction of the referee be shown upon hearing of the referee's certificate of contempt for alleged violation of such order, in the same bankruptcy proceeding and Court, when such order was made in excess of the jurisdiction of the referee?

3. Upon direct attack on the validity of such order of the referee, may not error be shown in the making of such order as well as excess of jurisdiction, lack of jurisdiction or failure to exercise jurisdiction in the proper manner?

4. Does the act of stipulating that an order may be entered by the referee upon the express condition that the person so stipulating reserves his objections to jurisdiction, timely made, prevent him from showing the lack of jurisdiction of the referee to make such order, on hearing of the certificate of contempt for alleged violation of such order?

5. May consent be given to the entry of an order in excess of the jurisdiction of the referee which will preclude the raising of such lack of jurisdiction, on hearing of the certificate of contempt for alleged violation of such order in the same bankruptcy proceeding and same district court?

ARGUMENT

I.

The District Court Had No Jurisdiction To Make the Order of Injunction Which Is, Therefore, Invalid and Void, and the District Court Did Not Err In Dismissing The Contempt.

1. The Injunction Prohibiting Appellee From a Normal and Lawful Use of Its Property, Was Beyond the Jurisdiction of Any Court.

2. The Order of Injunction Was Beyond the Jurisdiction of the District Court.

The facts indicate that appellee, Bolsa Chica Oil Corporation, an operator in the same oil field as appellant, was about to redrill and deepen an oil well from a town lot drilling site, not adjacent to, but in the neighborhood of the town lot drilling site of appellant. Appellant conceived the possibility that this operation might result in harm to its well.

Anticipating that appellee Bolsa Chica Oil Corporation, might in its drilling operations, mud off appellant's well, appellant applied for and was given an injunction by the referee in bankruptcy, which is the basis of the present contempt proceedings.

It is our contention that such act was in excess of the jurisdiction of the referee, and that had such an application been made to any court, such an injunction would have been in excess of its jurisdiction.

Jurisdiction is a word that has been given so many various meanings that its particular use in a given instance needs definition. We propose here to discuss jurisdiction as it involves the power of the court, it being our

belief that no court, under the facts of the case at bar, has jurisdiction to grant an injunction. Illustrative of the lack of the type of jurisdiction that we believe here exists is the following explanatory statement on jurisdiction found in 28 Am. Jur. 423 reading as follows:

> "Under constitutional provisions which confer power upon certain courts to issue writs of injunction and all writs necessary to enforce their jurisdiction, and statutes which in broad terms provide for cases in which injunction may issue, such courts may issue writs of injunction in all cases in which courts of chancery would have power to issue them conformably to established rules of equity. The legislature may change the substantive law and in so doing increase or reduce the subject matter upon which the jurisdiction of courts to issue injunction operates.
>
> Jurisdiction, in this connection, does not relate to the right of the parties as between each other, but to the power of the court. The question of its existence is an abstract inquiry, not involving the existence of an equity to be enforced, or the right of the plaintiff to avail himself of it if it exists. It precedes these questions, and a decision upholding the jurisdiction of the court is entirely consistent with a denial of any equity, either in the plaintiff or in anyone else. It exists, in such sense as to render injunction obligatory, when the court granting it has authority to decide whether the application for it shall be granted —it does not depend on the correctness of the decision. Courts sometimes say that there is no jurisdiction to award injunction, when they mean merely that equity ought not to give the relief asked. In other words, they are referring rather to a lack of sufficient grounds for issuing the writ than to want of power. The distinction should be kept in mind between total

> want of jurisdiction—absolute absence of power to entertain the injunction suit and award the remedy—and an unjustifiable or erroneous exercise of jurisdiction. A proper understanding of these two phases of jurisdiction is necessary in determining the validity and binding effect of the injunction decree and its vulnerability to collateral attack."

In the present case an injunction was issued on the mere apprehension of injury. No injury was threatened, no invasion of appellant's property was imminent. The proceedings that culminated in the injunction were unusual to say the least. Appellant, an oil operator in a common pool, hailed a fellow operator into court and asked that the court instruct this fellow operator as to the use he might make of his property. There was no claim that the fellow operator was violating any law, or that he was using his property or was about to use his property in an unlawful manner. There was no charge of negligence. There was no claim that appellee was about to perform any act in redrilling its well that was not the usual or customary practice in the industry. Yet appellee was brought into court and was subjected to a broad injunction which virtually gave to appellant control of appellee's drilling operations.

In short, one property owner was permitted to control and to dictate his neighbor's use of his property. Appellant claims no property interest in appellee's property. Appellant points to no statute that makes appellee's property subservient to appellant. There is no common law principle that would justify its assertion of dominion over its neighbor. No nuisance was involved. No right of appellant was invaded or even threatened. We submit that a monstrous wrong was done to appellee; private rights

were ruthlessly invaded and the referee in bankruptcy exceeded his power in granting such an injunction. He purported to enjoin acts of appellee concerning which no court had authority to invade by injunction.

This is not a situation where it may be said that the referee was simply acting to protect the property of the bankrupt estate. He was not so acting. He was supervising appellee's use of its property, under the guise of protecting appellant's property.

If a referee in bankruptcy can tell appellee how to conduct its drilling operations, he can likewise supervise all other neighboring operators, and as it is common knowledge that due to the fugacious character of oil and gas, what one operator does in a field to a greater or less degree affects all operators in the field, it follows that a referee under the disguise of protecting bankrupt assets, may control an entire oil pool. Such is not the law.

It would be absurd to contend that by the scheme of injunction, or on the theory of protecting property in the custody of the court, a trustee in bankruptcy of an estate that had as an asset a motor vehicle, if a third person was involved in an accident with this motor vehicle, could hold in contempt of court and for damages in a contempt proceeding, such third person. The possibility of being involved in an automobile accident is as imminent as damage from drilling. Because there have been automobile accidents, can a referee enjoin all residents of a district from having an accident involving bankrupt property? May he by injunction, dictate driving speeds for others, the type of gasoline used, the kind of tires, and the like? And may he, in the event of accident, hold third persons guilty of contempt and assess damages, denying a jury

trial, and ignoring all questions of negligence on the part of such other person and contributory negligence on the part of the operator of the trust estate vehicle? Such in legal effect is appellant's case.

Illustrative of our contention as to our right to the lawful use of our property without interference from third persons, see:

22 Cal. Jur. 419;

Hoffman v. Tuolumne County Water Co., 10 Cal. 413 (1858);

Sutliff v. Sweetwater Water Co., 182 Cal. 34 (1920).

Equity will not restrain a property owner from a lawful use of his property.

American Bank & Trust Co. v. Federal Reserve Bank of Atlanta, 67 L. Ed. 1153, 262 U. S. 643 (1922);

City of Janesville v. Carpenter, 77 Wis. 288, 46 N. W. 128, 8 L. R. A. 808 (1890).

See also:

Beauchamp v. United States, 76 Fed. (2d) 663 (C. C. A. 9th, 1935);

Vallely v. Northern F. & M. Ins. Co., 254 U. S. 348, 65 L. Ed. 297 (1920).

In *American Bank & Trust Co. v. Federal Reserve Bank of Atlanta, supra,* plaintiff sought to enjoin the Federal Reserve Bank, by offering superior facilities for clearing of checks. In so doing, the Federal Reserve Bank subjected country banks to losses. (Elimination of discounts and by speed in clearance, loss of interest.) Plain-

tiff sought to enjoin the Federal Reserve from so acting. The court said:

> "Country banks are not entitled to protection against legitimate competition. Their loss here shown is of the kind to which business concerns are commonly subjected when improved facilities are introduced by others, or a more efficient competitor enters the field. It is *damnum absque injuria.*"

The injunction was denied.

Mr. Justice Brandeis' language is equally applicable here. If, as a result of a lawful non-negligent use of our property, plaintiff was damaged, it would have been *damnum absque injuria.* Under such circumstances a plaintiff, because he anticipates the possibility of a loss for which the law gives him no remedy, cannot by the device of an injunction, create a right that otherwise is non-existent in the law.

This is strikingly illustrated by the case of *City of Janesville v. Carpenter,* 77 Wis. 288, 46 N. W. 128, 8 L. R. A. 808 (1890). The City of Janesville and Janesville Cotton Mills sought to enjoin defendant from erecting a building on Rock River on property owned by defendant. The building would involve the driving of piling. The theory of plaintiff city, when reduced to its fundamentals, was that if defendant so built, other persons might follow his example, and when similar buildings extend up and down the river, danger by fire and flood, and to the public health would result. The theory of the Janesville Cotton Mills was that the erection would cause the water of the river to rise and set back to some extent at the place where the mill took its water. There was no evidence that this would be harmful.

As to the city's contention the court said:

> "This is a most remarkable case, and there has never been anything like it. It is not charged that the proposed building will in itself do any harm in any respect whatever, or that the defendant has not the right to build it where he proposes to build it, but that it may possibly be followed as an example by others in building buildings which may possibly do harm. It would be a new case where one had actually done something in itself right and harmless, and he should be sued, because others had done something wrong and injurious by following his example, and it would be a strange case to enjoin one from doing something right and harmless in itself, because others may possibly do something wrong and injurious by following his example; and yet the latter is the present case. A mere example is not actionable. Such is the action in favor of the City."

Concerning the *Janesville Cotton Mills* case the court said:

> "We think the learned counsel of the appellant is right in claiming that the complaint does not charge facts sufficient to state any cause of action known to the general laws of the land and the practice of courts in favor of either plaintiffs. But, even if the complaint sufficiently charged that the consequences predicted would be produced by the proposed building, the City of Janesville has no such corporate interest in them as would authorize it to maintain such an action. *Milwaukee v. Milwaukee & B. R. Co.,* 7 Wis. 85; *Sheboygan v. Sheboygan & F. du L. R. Co.,* 21 Wis. 668.
>
> But it is sufficient that no wrong, injury or damage is charged. By the extended jurisdiction of the

court in equity, by chapter 190 of the Laws of 1882 amending section 3180, Rev. Stat., there must be some special injury or necessity to protect the rights of some person, to grant an injunction. As a private nuisance or a public nuisance, by which some private person has suffered some special and peculiar injury, there must be material annoyance, inconvenience, discomfort or hurt, and the violation of another's rights in an essential degree. Wood, Nuis. 1-4.

The law gives protection only against substantial injury, and the injury must be tangible, or the comfort, enjoyment or use must be materially impaired. *Stadler v. Grieben,* 61 Wis. 500; *Pennoyer v. Allen,* 56 Wis. 502, and many other cases in this court.

It is a maxim of the law that wrong without damage or damage without wrong does not constitute a cause of private action. It is charged that this building will be in violation of an ordinance of said City. That would not give a cause of action for an injunction, even if the ordinance so provided. *Waupon v. Moore,* 34 Wis. 450.

The argument of the learned counsel of the respondents, and the authorities cited on the question whether the proposed building will obstruct the navigation of the river, are impertinent to the case. There is nothing in the case that involves any such question in the remotest degree. Within any grounds or reasons known to the well-settled principles and practice of equity jurisprudence, the complaint states no case for an injunction, or for any other purpose. The action is not based on any statute which gives a right of action in such a case. But the learned counsel of the respondent cites chapter 423, Laws 1887, in support of the action. This Statute is, if possible more marvelous than the complaint."

The court then proceeds to hold the statute unconstitutional as special legislation.

In the present case there was no wrong threatened on which appellant was entitled to damages, and damage without wrong does not constitute a cause of private action. Where such are the facts, a complaint cannot state a cause of action for an injunction—the court lacks jurisdiction. Appellant here, by the guise of injunction and the remedy of civil contempt, is seeking damages under facts where the law denies it damages. It is seeking to establish a principle of liability without fault to circumvent the law by its scheme of an injunction.

An analogous case is *Beauchamp v. United States,* 76 Fed. (2d) 663, which establishes the law in this, the 9th Circuit.

There, a referee in bankruptcy, following a trustee's sale of the business of the bankrupt estate, an insurance agency corporation, enjoined Beauchamp and his sons who had owned all but qualifying shares of the corporation, from reengaging in the same business, from competing with the purchaser and from soliciting former customers and patronage. It was held by this court as follows:

> "Appellant was under no contractual obligation to refrain from soliciting customers of the former business of which he was an agent. The right to use his own name in earning a livelihood should not be taken away. While a covenant not to solicit can be implied in a voluntary transfer, there is no such implication in an involuntary transfer. The policy of the Bankruptcy Act to give the bankrupt a fresh start in life would be defeated if he were precluded from engag-

ing in a similar business or from soliciting his old customers. Were the policy of our bankrupt statutes otherwise, instead of being a mode of relieving the debtor, it would close to him every avenue of hope for the future. *Helmbold v. Henry T. Helmbold Mfg. Co.,* 53 How. Prac. (N. Y.) 453; *Theobald-Jansen Electric Co. v. Harry I. Wood E. Co.,* 285 F. 29 (C. C. A. 6); *Bellows v. Bellows,* 24 Misc. 482, 53 N. Y. S. 853.

The order of the referee appears invalid, for the reason that it is permanent, extends to all business, and is not restricted to any particular locality. The Code provides that: 'One who sells the good-will of a business may agree with the buyer to refrain from carrying on a *similar* business within a *specified county, city,* or *a part thereof,* so long as the buyer, or any person deriving title to the good-will from him, carries on a like business therein.' (Italics ours.) Civ. Code Cal., Sec. 1674.

In order that disobedience of this injunction order may constitute contempt, it is necessary that the order be valid. Disobedience of a void mandate, order, judgment, or decree, or one issued by a court without jurisdiction of the subject-matter and the parties litigant, is not contempt.

When '* * * a court of the United States undertakes, by its process of contempt, to punish a man for refusing to comply with an order which that court had no authority to make, the order itself, being without jurisdiction, is void, and the order punishing for the contempt is equally void. * * *' *Ex parte Fisk,* 113 U. S. 713, 5 S. Ct. 724, 726, 28 L. Ed. 1117; *Ex parte Terry,* 128 U. S. 289, 9 S. Ct. 77, 32 L. Ed. 405; *In re Ayers,* 123 U. S. 443, 8 S. Ct. 164, 31 L. Ed. 216."

There as here, an order was made in excess of the jurisdiction of the referee and it was there held that contempt cannot be predicated on an order where such jurisdiction is lacking.

As a summary to this point we desire to quote from the oral opinion of the Honorable Judge Leon R. Yankwich in the court below:

> "This order, in addition to enjoining the defendants, also gave authority to the trustee to institute action for damages or for injunctive relief. They were brought here on a contempt citation and it was insisted that the court penalize them for the violation of this injunction of the court. In other words, the court has power to impose a fine and impose it by way of damages, then allow the estate later on to assess additional damages for the loss caused by the acts themselves after the court had imposed the penalty for violation of its interdict. The courts lately have scrutinized records and have raised questions relating to jurisdiction when the thought never occurred to counsel and was never even suggested by counsel to the court below. I feel, in a case of this character, where the challenge over jurisdiction has been made, the court should inquire into it. I am satisfied that the court has no jurisdiction whatsoever and that their appearance and response to an order to show cause, which they have to obey under penalty of having default taken against them, didn't constitute a waiver. And if, as I believe, it is beyond the power of the bankruptcy court to, in effect, make a declaration that unless the well is drilled in a certain way damage will result and the man will be enjoined from doing something on his

> own property, property which is not the subject of bankruptcy, his actions therein, in the failure to review, does not involve a waiver on his part."

We have heretofore discussed the question of jurisdiction from the aspect of any equity court, and have contended that no court has jurisdiction to enter the injunction order here for review. We desire briefly to consider the special question of the jurisdiction of a Federal District Court, and of its Referee, as it applies to the facts of the case.

The District Court is a court of limited jurisdiction. (*Simkins' Federal Practice,* 3d Ed., Sec. 23, p. 36; 28 *U. S. C. A.,* Sec. 41 (1).)

There is no presumption in favor of jurisdiction, but on the contrary the presumption is against jurisdiction, and jurisdiction must affirmatively appear on the face of the record in order to vest the court with jurisdiction. (*Simkins' Federal Practice,* 3d Ed., Sec. 26, p. 38.)

The burden of establishing the jurisdiction is upon plaintiff, and it never shifts. (*Simkins' Federal Practice,* 3d Ed., Sec. 29, p. 43.)

Objection to the jurisdiction may be raised at any stage of the proceeding. (*Simkins' Federal Practice,* 3d Ed., Sec. 27, p. 38.)

Under the Constitution of the United States, there must be an actual existing factual controversy, and no advisory opinion may be rendered by the Federal courts. (*Simkins' Federal Practice,* 3d Ed., Sec. 24, p. 37, citing cases.)

It follows from the above that it is incumbent upon the appellant to establish from the record affirmatively the existence of the jurisdiction of the referee in the proceeding. The rule is well stated in 20 *American Jurisprudence,* Sec. 31, p. 224, as follows:

> "It would seem to follow, and in fact has become an established principle of equity, that one may not be enjoined from doing lawful acts to protect or enforce his rights of property or of person even though damage or loss may result to another as a necessary consequence thereof."

The mere fact then that appellant may have suffered damage is not *ipso facto* sufficient as a ground for vesting the Court with jurisdiction to have issued an order of the character here involved. That which appellees have done has not been shown to be an unlawful, wilful, negligent or unreasonable use of their property, or a nuisance, or anything else than customary and ordinary oil field practice in the field in which the property is located. It is the contention of appellees that no right of action of any nature or character to recover damages exists in appellant in the absence of a showing of negligence or intentional injury, which has not been alleged or proven.

The order of the referee did not enjoin appellees from trespassing upon the property of the bankrupt. It affirmatively prohibited them from taking a particular course in the drilling of their well, and from the use of certain

materials in connection with such drilling. There is no allegation that appellees approached closer to the well than the prohibited distance. The only allegation is that appellees used mud as a circulating medium contrary to the terms of the injunction, which is a fact appellees contend is not the case, and cannot be proven, even if the injunctive order were valid.

If the appellant is predicating his case upon the general equity jurisdiction of the District Court, it is obvious that no such jurisdiction existed for the following reasons:

1. No diversity of citizenship between the parties was alleged or appears from the record.

2. There is no allegation of inadequacy or uncertainty of damages.

3. There is no allegation of continuous trespass.

4. There is no allegation of the existence of a nuisance.

5. There is no allegation of an unlawful act.

6. There is no allegation of the insolvency of appellees.

7. There is no civil liability for the damage suffered under any circumstances.

All of the cases cited by appellant in his brief, dealing with the power to issue injunctions, are based upon one or more of the above grounds. Appellant has filed suit for damages in the Superior Court of the State of California, which is now pending. If appellant is entitled to any dam-

ages, he will recover them in that action. It is the contention of appellees in that action, as well as in this proceeding, that there is no liability in any event in the absence of negligence.

If, as heretofore considered, appellant is relying upon the bankruptcy jurisdiction of the Court, it is equally obvious that there is no jurisdiction, inasmuch as the bankruptcy jurisdiction is limited to enjoining trespass upon, or interference with the possession of property belonging to, and in the custody or possession of the bankruptcy estate. All of the appellant's cited cases on this point show, upon the facts and in the quotations, that the power is so limited. In no case which the appellant has cited, or which we have found, has the District Court under the bankruptcy jurisdiction enjoined a stranger to a bankruptcy proceeding from making a lawful use of his own property which is not in the possession, custody or control of the bankruptcy court.

We submit, therefore, that there was no jurisdiction for the action of the referee in issuing an injunction such as here before the Court. In so doing he exceeded his power as an arm of the Federal District Court. We have shown that no court of equity possesses the jurisdiction to make such an order and that Federal courts, being courts of limited jurisdiction, certainly have no such jurisdiction, and that even if they had, in the present case so many other jurisdictional factors are absent that the injunction was wholly void.

II.

The Referee Had No Jurisdiction to Make the Order of Injunction in a Summary Proceeding, Which Order Is Therefore Invalid and Void.

Whether or not plenary jurisdiction existed in the District Court, the referee is without power or authority, in a summary proceeding, to enjoin a stranger to the bankruptcy from performing a lawful act upon his own property. The jurisdiction, in this connection, of the referee, is stated as follows at 8 *Corpus Juris Secundum* 981:

> "The jurisdiction and authority of a Referee in Bankruptcy under a general reference is limited to ordinary administrative proceedings in bankruptcy and such controversial matters as arise therein and are in effect a part thereof. He is without jurisdiction to pass on issues raised in a plenary suit by the trustee against a third party to set aside a fraudulent transfer or conveyance and affecting property not in the custody or control of the court of bankruptcy.
>
> A Referee cannot entertain an action to collect a debt or a suit for specific performance."

An examination of the authorities collected in 8 *Corpus Juris Secundum,* page 982, indicates that the referee's power to issue injunctions is limited to enjoining interference with the trustee's possession of property in his control. The only case whch we have found dealing with injunctive power over property not in the possession or control of the bankruptcy is *In re Ward,* 104 Fed. 985 (Dist. Court, Mass.). In this case the referee attempted

to enjoin disposition by a third party of property claimed by the bankruptcy estate but in the possession of such third party. The Court held that the referee was without jurisdiction to order such injunction due to his lack of power to recover possession. The so-called turn-over cases, by analogy, are practically conclusive on the limited nature of the referee's summary jurisdiction. As was said in *In re Meiselman* (C. C. A. 2nd), 105 Fed. (2d) 995:

> "It is now settled that, if there is a real and substantial controversy of law or fact as to property held adversely to a bankrupt * * * the bankruptcy court is 'without jurisdiction' to adjudicate the matter but the trustee must have resort to a plenary suit."

Similarly, in *Harrison v. Chamberlain,* 271 U. S. 191, 70 L. Ed. 897, 46 S. Ct. 467, which involved a summary proceeding to determine title to property held by a stranger to a bankrupt estate, the Court held that, if there is any substantial question of law or fact, even if fraudulent, it must be determined in a plenary action. In this case the defendant objected to the jurisdiction, was overruled, and then answered, which action did not estop him from later objecting to the summary jurisdiction.

A similar case is *Weidhorn v. Levy,* 253 U. S. 268, 64 L. Ed. 898, 40 S. Ct. 534, which case contains a very good discussion as to the difference between a bankrupcty "proceeding" and a "controversy." This case holds that the referee is merely an officer

of the Court and has no power in the absence of consent to determine adverse claims.

A similar case, which is cited and discussed in *Matter v. Baldwin,* 291 U. S. 610, cited and relied on by appellant at page 46 of his brief, is *Taubel-Scott-Kitzmiller Co. v. Fox,* 264 U. S. 426, 68 L. Ed. 770, 44 S. Ct. 396. This case involved a summary proceeding to declare void a lien on property in possession of the sheriff and not the trustee. The Court held that there was no jurisdiction in the referee, either summary or plenary, to make such declaration. The Court says, at page 438:

> "Neither the judgment creditor nor the sheriff had become a party to the bankruptcy proceeding. There was no consent to the adjudication by the bankruptcy court of the adverse claims. The objection to the jurisdiction was seasonably made and was insisted upon throughout. The bankruptcy court, therefore, did not acquire jurisdiction over the controversy in summary proceedings, nor did it otherwise."

Proceedings before the referee are informal and require no formal pleadings defining the issues in controversy. It would be hard to find a better example of the injustice which would result from extending the jurisdiction of the referee than is present in this case. Appellees believe, and contend that there is no liability of any character under the circumstances, which contention they will have an opportuinty to sustain under well established rules of procedure in the Superior Court of the State of California in the action now pending therein filed by ap-

pellant. If the referee, upon informal proceedings arising on a petition for instructions, with only a few days' notice, with no issues defined, and involving a highly technical engineering matter which might easily be the subject of protracted litigation requiring the testimony of highly skilled technical engineers, has authority to enter an injunctive order of the character involved in the case at bar, violation of which submits the appellees to civil damages, where no legal liability or fault exists, the miscarriage of justice is so apparent as to be obvious.

To summarize, the appellees contend:

1. That there is no liability of any character under the circumstances in the absence of alleged and proven fault, which has not been done.

2. There is no injunctive power in any court upon the facts at bar.

3. Even if fault were alleged and could be proved, and even if there were power to issue an injunction in the State court, the Federal court has no such power, because the case is not within either the equity or bankruptcy jurisdictions of the District Court.

4. Even if all of the contentions above made could not be sustained, the referee has no summary jurisdiction to issue the order, violation of which is complained of by the appellant in the absence of consent by appellees, which consent was not given, as hereinafter in this brief is conclusively shown.

III.

The Invalidity of the Order of Injunction May Be Shown on the Hearing on the Certificate of Contempt and the District Court Did Not Err in Permitting the Attack and Dismissing the Contempt.

1. The Attack Was a Direct Attack, and Hence, Whether the Order Is Void on Its Face or Merely Erroneous, the District Court Properly Dismissed the Contempt Proceeding.

2. Even if the Attack Was Collateral, It Could Be Made, as the Order of Injunction Was Void on Its Face as Beyond the Jurisdiction of the Court to Make.

3. In Any Event, the District Court Has Power to Vacate or Modify Its Orders in Bankruptcy at Any Time During the Pendency of the Bankruptcy Proceeding, and the Order of the District Court Dismissing the Certificate of Contempt and Impliedly Vacating the Order of Injunction Was Validly Made and Is Conclusive on Appeal in the Absence of Abuse of Discretion.

Whether the attack is direct or collateral, lack of jurisdiction being apparent on the face of the record, the question as to whether or not the appellees may raise on contempt proceedings the question of the authority of the referee to render the injunction will stand or fall with the determination of the Court of the first point made in this brief that the referee had no jurisdiction to make the order. (21 *Corpus Juris Secundum,* Sec. 116, p. 177.) That is to say, if the referee had jurisdiction, this appeal is determined adversely to appellees in any event (unless the decision of the District Court is conclusive as hereinafter pointed out); if the referee did not have jurisdic-

tion, such lack of jurisdiction being apparent from the face of the record, whether the attack may be said to be direct or collateral, it may be raised at the hearing upon the certificate of contempt and this appeal is determined adversely to appellant.

It hardly needs further argument than the mere statement above made that, under the circumstances here involved, the question of the nature of the attack is immaterial and the determination thereof is merely ancillary to the determination of the main question as to whether or not the referee had jurisdiction to make the order. In view of the fact, however, that this is the point upon which appellant mainly relies, rather than lack of jurisdiction itself, and the one to which he has devoted the major portion of his brief, it is well to discuss in general the cases cited by him, and upon which he relies, even though his theory of the case is erroneous.

It should be pointed out at the start that appellant has not directed the attention of the Court to any case involving a situation similar to that at bar. He has not cited a single case arising on a contempt proceeding in the same bankruptcy proceeding as that in which the order violated was issued. Whether this is because he was unable to find any such case, or whether he studiously avoided them, we are unable to say. In any event, he is forced to argue by analogy, from cases citing the hornbook rule, that a collateral attack may not be made upon a judgment unless it is void on its face. Every case cited in appellant's opening brief, with possibly one exception, involved two distinct proceedings. The attack in each instance was made in a separate action upon a judgment or order obtained in a prior action; hence, the attack was obviously

collateral. The exception is the case of *Robert H. Jackson v. Irving Trust Co., et al.,* 85 L. Ed. Adv. Op. 310. That case arose on motion to vacate. The Circuit Court held the attack collateral. The Supreme Court does not find it necessary to do so. It says (p. 313), "The suit in question was precisely within the terms of the Act." That case was merely an attempt to retry all the issues of the prior proceeding. It was not a contempt proceeding and does not apply to the problem at bar even by way of analogy.

The appellant is relying, as above stated, solely on analogy and general language used by the courts in discussing the ordinary rule of collateral attack. Appellees are not, but on direct authority. The District Judge, in rendering his decision in this case, expressly stated that the attack in this case is a direct attack and not a collateral attack. He pointed out that it is inherent in a contempt proceeding arising in the same bankruptcy proceeding in which the order of injunction is made, that the attack is by its very nature direct and not collateral. In taking this view, he relied upon the leading case of *Ex parte Sawyer,* which he discusses in his opinion [Tr. pp. 253 to 259], and which fully substantiates his view. In addition to this case, the leading case on the subject which has been cited in a number of instances is *Ex parte Fisk,* 113 U. S. 713, 28 L. Ed. 1117, 5 S. Ct. 724, which expressly holds that the matter of the validity of the original order may be raised in a contempt proceeding, arising by virtue of violation of such order, and if the order is void for lack of jurisdiction, the defendant may not be held in contempt. In this case the Federal Court directed defendant to submit to examination. He refused and was committed for

contempt. The case arises on writ of *habeas corpus*. While, under some circumstances, the Court had the right to order an examination, it was found that they were not present in this case, and, hence, the order was beyond the power of the Court to issue. The Supreme Court examined the record to ascertain this fact. The *Fisk* case is relied upon by the Circuit Court of Appeals of the Ninth Circuit in determining, in 1935, the case of *Beauchamp v. United States,* 76 Fed. (2d) 663, referred to hereinbefore. In this case, an order to show cause was issued by the referee in bankruptcy requiring the respondent to appear before the referee to show cause why he should not be enjoind from competing with the insurance business thertofore conducted by the bankrupt corporation of which he was stockholder. The referee enjoined the servants and employees of the bankrupt from doing certain proscribed competitive acts. The respondent subsequently performed certain of the proscribed acts, and the contempt proceedings were thereupon brought. The defendant demurred to the information in the contempt proceeding and was overruled, was found guilty and fined. The Circuit Court found that the order of the referee was invalid for the reason that it was permanent, extended to all business, and was not restricted to any particular locality, and hence, in excess of the jurisdiction of the Court. The Court then goes on to say:

> "In order that disobedience of this injunction order may constitute contempt, it is necessary that the order be valid. Disobedience of a void mandate, order, judgment, or decree, or one issued by a court without jurisdiction of the subject-matter and parties litigant, is not contempt.

> "When '* * * a court of the United States undertakes, by its process of contempt, to punish a man for refusing to comply with an order which that court had no authority to make, the order itself, being without jurisdiction, is void, and the order punishing for the contempt is equally void. * * *' *Ex parte Fisk*, 113 U. S. 713, 5 S. Ct. 724, 726, 28 L. Ed. 1117; *Ex parte Terry*, 128 U. S. 289, 9 S. Ct. 77, 32 L. Ed. 405; *In re* Ayers, 123 U. S. 443, 8 S. Ct. 164, 31 L. Ed. 316."

This case is squarely in point, and being decided by the Ninth Circuit, is determinative of this appeal. That the question of collateral attack was considered and determined is clearly shown by Justice Wilbur's concurring opinion.

Now, turning to the case upon which appellant principally relies, to-wit: *Stoll v. Gottlieb*, 305 U. S. 165, 83 L. Ed. 104, 59 S. Ct. 134, we find the same distinction made. The Court at page 176, in distinguishing the case of *Vallely v. Northern F. & M. Insurance Company*, 254 U. S. 348, 65 L. Ed. 297, 41 S. Ct. 116, states as follows:

> "The case is also distinguishable because the motion to vacate was made in the same bankruptcy proceeding as the order."

In other words, *Stoll v. Gottlieb* involved two distinct proceedings and, hence, the attack was collateral. Justice Reed obviously had in mind the fact that if the attack arose in the same proceeding, still pending, in which the order had been issued, the attack would be direct inas-

much as, in bankruptcy, orders may be modified, vacated or set aside at any time until the close of the particular bankruptcy proceeding.

> *Re Cadillac Brewing Co.* (C. C. A. 6th), 102 Fed. (2d) 369;
>
> *Wayne United Gas Co. v. Owens Illinois Glass Co.,* 300 U. S. 131, 57 S. Ct. 382, 81 L. Ed. 557.

In addition,

> "When a court has erroneously exercised jurisdiction which it did not possess, it has power to correct any wrong which may have resulted from such improper action by undoing what was done, as by setting aside any ruling, order or judgment made by it, at least so long as the subject of the controversy is in its custody and the parties are before it." (21 *Corpus Juris Secundum,* p. 179, Sec. 119.)

The principal bankruptcy proceeding in which this matter arises has been pending since 1935 and is still pending with no particular imminence of termination.

The case of *Vallely v. Northern F. & M. Insurance Company, supra,* discussed by Justice Reed, involved a case in which an insurance corporation was adjudicated an involuntary bankrupt in the teeth of the provisions of the Bankruptcy Act excepting insurance corporations therefrom. After the time for review of the adjudication had expired, the bankrupt filed a motion to vacate the adjudication, which was upheld by the Court. Quoting from the case of *Stoll v. Gottlieb, supra,* at page 176, in this connection:

> "It was pointed out that a determination of a jurisdictional fact, such as whether an alleged bankrupt is a farmer, binds, but that where there was no

> statute of bankruptcy applicable 'necessarily there is no power in the District Court to include', the excepted corporation. It was thought that to recognize the binding effect of the judgment would be to extend the jurisdiction."

In other words, the case upon which appellant principally relies, on its face shows that it is distinguishable from the case at bar, inasmuch as it distinguishes a case on all fours with the case at bar holding that in the same proceeding an attack may be made after the time for review or appeal has elapsed on the validity of an order made in excess of the jurisdiction of the Bankruptcy Court.

Collier on Bankruptcy, 14 Ed., Vol. 1, page 146, in discussing *Stoll v. Gottlieb,* says:

> "Of course, in every case, the issue may be raised by proper direct attack in the district court or by appeal."

In support of this statement he cites *Davis v. Shackleford* (C. C. A. 8th), 91 Fed. (2d) 148, in which the court says:

> "It is true, as contended by appellees, that want of jurisdiction may be raised in the Federal Court at any stage of the proceeding * * *."

It is the contention of the appellees that, as was decided by the District Judge, where an attack is in the same proceeding, as in the case at bar, and as in the *Vallely* case, the attack is direct and not collateral. No authority has been cited by the appellant to the contrary, and the conclusion of the District Court is directly supported by the authorities herein set forth. Therefore, even if the injunction order were not void on its face, it can be at-

tacked in this proceeding on the ground of erroneous assumption of jurisdiction.

This conclusion is supported by the following additional cases:

Ex parte Lennon, 166 U. S. 548, 41 L. Ed. 1110, 17 S. Ct. 658;

Ex parte Rowland, 104 U. S. 604, 26 L. Ed. 861;

Abbott v. Eastern, etc. Co., 19 Fed. (2d) 463, (C. C. A. 1st);

Swartz v. United States, 217 Fed. 866 (C. C. A. 4th);

Brougham v. Steam Navigation Co., 205 Fed. 857 (C. C. A. 2d);

In re Home Discount Co., 147 Fed. 538 (Dist. Ct. Ala.);

In re Weiser, 19 Fed. Supp. 786 (Dist. Ct. N. Y.).

In *Ex parte Rowland, supra,* which case arose on an application for writ of *habeas corpus,* and in which case the court was found to have acted beyond its authority in issuing a writ of mandamus, the United States Supreme Court states as follows:

> "But if the command was in whole or in part beyond the power of the court, the writ, or so much as was in excess of jurisdiction, was void, and the court had no right in law to punish for any contempt of its unauthorized requirements. Such is the settled rule of decision in this court."

Similarly in *Swartz v. United States, supra,* the Court says:

> "It is true that the judgment for contempt as well as the order for injunction, will be set aside on writ of error when the trial court had no jurisdiction to make the order of injunction."

The same rule has been enunciated by the courts of the State of California. In *Maier v. Luce,* 61 Cal. App. 552 at 558, the Court makes the following statement of the rule:

> "No one may be punished for contempt because of his disobedience of a void order."

Exactly the same language was used in *Watchuma Water Company v. Superior Court,* 215 Cal. 734, and the general rule is so stated at 12 *American Jurisprudence,* page 408.

In the case of *Sontag Chain Stores Co., Ltd. v. Superior Court,* 18 Adv. Cal. 65, decided by the Supreme Court of the State of California on May 29, 1941, it was held that the Superior Court may vacate an injunction against picketing when it later appears that the Court acted beyond its jurisdiction in issuing the order due to a misconception of its power. It was argued that this was error only and could not be attacked, but the Court, in distinguishing *United States v. Swift & Co.,* 286 U. S. 106, relied upon by appellant, says that injunctions of the character involved in this case are continuing in character and may be later vacated.

It is interesting to note the following language appearing at page 70:

> "To compel defendant labor unions to seek redress by the indirect method of violation of the terms of the injunction and defense of a contempt proceeding, or certiorari, or *habeas corpus* to secure relief from the contempt commitment, would be to relegate them to a remedy which is indeed circuitous. (See general discussion in 47 Yale Law Journal, pp. 136, *et seq.*)"

The Court obviously recognizes that without question the validity of the injunction order could be attacked in the contempt proceeding. The only question was whether a short cut could be taken by vacating the order. The Court held that it could. This case conclusively determines appellees' right of attack under the California law. Such right, under the Federal law, is similarly conclusively determined by *Beauchamp v. United States, supra.*

It should be noted here that in cases of collateral attack the attack is made by the moving party. In the proceeding at bar, appellant is the moving party, not appellees, thereby bringing the matter again before the Court and recommencing the litigation. The argument of multiplicity of actions does not, therefore, apply, and appellees are entitled to present all defenses.

Moreover, even if the attack could be said to be collateral, which we have shown is not the case, it still can be made inasmuch as the case at bar does not involve error on the part of the referee, but complete lack of

jurisdiction apparent on the face of the record, and, therefore, the ordinary rule that collateral attack will lie upon a void order is applicable. It does not need the citation of authorities to support this rule, which is universally recognized. The only point that can be raised is in its application, and this point is determined by the argument first made in this brief as to the jurisdiction of the referee. It has been shown that the referee was without jurisdiction to make the injunctive order. Such fact is apparent on the face of the record and it is not necessary to go behind the record to determine such fact, although on the state of the present record this can be done. In *Shields v. Shields*, 26 Fed. Sup. 211 (Dist. Ct. Mo.), at page 215, the Court says:

> "This application for *habeas corpus* is a collateral attack on the judgment of the State Court. *Ex parte* Hans Nielsen, 131 U. S. 176, loc. cit. 182, 9 S. Ct. 672, 33 L. Ed. 118. Lack of jurisdiction may be shown in a collateral proceeding. Ruckert v. Moore, 317 Mo. 228, 295 S. W. 794. But in such a proceeding an affirmative finding of a jurisdictional fact may not be contradicted by evidence *aliunde*. Hartzfeld v. Taylor, 207 Mo. 236, 105 S. W. 599; *In re* Lennon, 166 U. S. 548, loc. cit. 553, 17 S. Ct. 658, 41 L. Ed. 1110. Therefore, the residence of petitioner may not be established in this proceeding by parol testimony. But facts appearing upon the face of the record may be utilized to show lack of jurisdiction, and where the record is silent as to a jurisdictional fact the presumption of jurisdiction of a

> court of general jurisdiction may be overcome by evidence of facts showing want of such jurisdiction. *In re Mayfield,* 141 U. S. 107, loc. cit. 116, 11 S. Ct. 939, 35 L. Ed. 635."

Under these circumstances the injunction was void and not voidable, and it may be subsequently attacked directly or collaterally.

Much, if not all, of the argument made in the preceding paragraphs in reply to appellant's brief is beside the point, as appellant's argument is beside the point. The authorities reviewed therein show the continuing power of the District Court to vacate or modify its orders. Obviously this includes orders of a referee, a subordinate officer, so long as the bankruptcy case is pending. What the Court did here is tantamount to an implied vacation of the injunctive order. Had the Court, *sua sponte,* seen fit to broaden its order to expressly do what it did impliedly, that is, actually vacate the order, or had application been made by appellees for an order vacating such order, affirmatively acted upon, the vacating by the District Court, in the absence of abuse of discretion, would be conclusive on this appeal. (*Kenyon v. Chain O'Mines* (C. C. A. Colo.), 107 Fed. (2d) 160.

The result is the same in any event, and it is the position of appellees that it was within the continuing jurisdiction of the Court under the circumstances to take the action it did, of dismissal, and that such action, not being an abuse of discretion, or even alleged to be, is not subject to review.

IV.

The Stipulation to the Entry of the Order of Injunction Is Not Grounds for Holding the District Court in Error in Permitting the Attack on Jurisdiction and Dismissing the Contempt.

1. Such Stipulation, Made With Reservation of Objection to the Jurisdiction, Did Not Constitute Grounds for Estoppel.

2. Such Stipulation, So Made, Did Not Constitute a Waiver of, or Consent to Summary Jurisdiction in the Referee.

3. Jurisdiction Cannot Be Conferred by Consent Where No Jurisdiction Exists.

4. Where the Attack Is a Direct and Not a Collateral Attack, Lack of Jurisdiction May Be Shown Even Though Not Apparent on the Face of the Record, and If It Does Not Exist, Consent Cannot Confer It.

Appellant relies on the fact that certain of the appellees stipulated to the issuance of the order of injunction, as grounds for estoppel against the appellees now asserting objections to the jurisdiction. This position is untenable.

In the first place the necessary grounds for estoppel are not present in that there was no reliance, no misleading and no change of position. Appellant had the option in this proceeding of choosing the proper tribunal and the proper legal remedy. It was his choice, and not the choice of appellees that gave rise to the present controversy. He chose injunction as his remedy, and he chose the referee as his tribunal. If he was in error in so doing, that is not the fault of the appellees, and he cannot rely or be misled under these circumstances. The appellees did not choose to go before the referee, but strenuously objected

and maintained their objections to his jurisdiction and that of the Bankruptcy Court at all times, from first to last. [Tr. pp. 29, 30, 92, 94, 96, 150, 154, 156.] They were strangers to the bankruptcy proceeding. They were not trespassing or threatening trespass upon, or damage to the bankrupt's property. They were merely proposing to drill an oil well on their own property. Under these circumstances they were of the view that the referee and the Bankruptcy Court did not have jurisdiction to instruct them as to their method of drilling, and so stated to the referee. [Tr. p. 92.] They reserved at all times their objections to the jurisdiction by appearing specially only [Tr. p. 92], and availing themselves of the right of cross-examination only subject to such objection. [Tr. p. 96.] They did not affirmatively take any part in the proceeding. They did not put on witnesses of their own. The referee, however, overruled their objections to the jurisdiction. Appellees took the position that there was no need to undertake the expense and delay of taking a review, and stipulated to the entry of the order, without conceding the validity of the order. [Tr. p. 156.] In effect they said, "You have dragged us into the Referee's Court. We do not believe that the Referee has any jurisdiction over us so long as we do not actually trespass upon the bankrupt's property, which we have no intention of doing. The order which you are willing to accept, but which we believe is void, is one with which we believe we can comply in any event. No further proceedings are, therefore, necessary at this time, but if we should violate the order we are advising you and the Referee that we do not deem it valid and we are still objecting to the jurisdiction of the Referee and the District Court to enforce it." The appellant obtained what he asked for, which was an order of the referee. It was his option

to obtain a valid order in the proper tribunal and in the proper suit. The appellees were not blowing hot and cold. They were merely saying that if the referee entered a certain order he could do so if he desired, subject to their objection to the fundamental right of the referee to enter it, and that they did not intend to take a review from it. In other words, the appellees were not put to an election. The election was that of the appellant, and he himself suffers the consequences of his own voluntary act in choosing the wrong remedy and the wrong tribunal. Hence, there is no misleading. The record is also devoid of any reference to change of position.

We have shown that there is no estoppel. Further, there is no waiver of any objection to the jurisdiction. Section 23b of the Bankruptcy Act is the only provision of law with which we are familiar, or which has been urged by appellant in this proceeding, under which jurisdiction may be conferred by consent, in the absence of actual jurisdiction over the subject matter. This provision refers, however, solely to cases of adverse possession and has no bearing on the present controversy, which involves only the power of a referee of the United States District Court, either as a court of bankruptcy or a court of equity, or an officer thereof, to enjoin strangers to the bankruptcy proceeding from doing lawful acts on their own property which do not constitute a trespass upon the property of the bankrupt. It is well settled, however, that, even were section 23b applicable, or consent could otherwise constitute a waiver, what the appellees did in this proceeding would not constitute consent to jurisdiction or waiver of their objection to the summary jurisdiction of the referee. A case relied upon by appellant in the District Court was *In re Murray* (C. C. A. 7th), 92 Fed. (2d) 612, which case the District Judge felt to be the

strongest case in appellant's favor. All this case stands for is that objection is made too late when it is not made until after the order has been entered. Even in that case, the Court admits that if objection to jurisdiction is made timely, and such objection is overruled, defendant does not waive such objection by then proceeding with the action. In that case an answer was filed to a summary proceeding to set aside a mortgage and trial was had and an order was made before any objection was made to the jurisdiction. The Court held that while the rule is clear that the referee has no plenary jurisdiction under these circumstances, the defendant may waive the same, and failure to object until the order had been made constituted a waiver.

In *In re Mitchie,* 116 Fed. 749 (District Court, Mass.), the case involved a petition to recover adversely held property. In this case defendant filed an answer and then demurred to jurisdiction. The Court found that the referee had no jurisdiction without the consent of the defendant and that the defendant did not consent. In this connection the Court states that the consent required must be complete and explicit, and cannot be implied. This case was cited with approval *In re Bastanchury Corporation,* decided by the Ninth Circuit Court of Appeals, 62 Fed. (2d) 537. This case arose on an order to show cause directed to the trustee under a bond issue to turn over property. The District Court made a turn over order. The Circuit Court ordered the property returned to the trustee under the bond issue, holding the claim adverse, no consent, and no jurisdiction in the referee. The rule is best emphasized by the decision, *In re Prima* (C. C. A. 7th), 98 Fed. (2d) 952, which involves two defendants, one of whom objected, as appel-

lees objected here, the other of whom did not. After the objection of the first was overruled, answer was filed and the ordinary trial procedure followed. The Appellate Court ruled that, as to the non-objecting defendant, there was a waiver of summary jurisdiction under section 23b of the Act, but as to the other defendant, there was not. To the same effect see *In re Schoenberg* (C. C. A. 2d), 70 Fed. (2d) 321; *In re White Satin Mills,* 25 Fed. (2d) 313 (Dist. Ct., Minn.); *Louisville Trust Co. v. Comingor,* 184 U. S. 18, 22 S. Ct. 293, 46 L. Ed. 413.

The above discussion of cases has been presented merely to show how explicit must be a waiver where even procedural jurisdiction is involved, and apply, as above stated, merely where there is a statutory rule permitting consent to summary jurisdiction, as compared to plenary jurisdiction; in other words, a waiver of a procedural as distinguished from a basically jurisdictional right. The cases cited by the appellant on the point of consent are not in point. In each instance the defendant asked the Court for affirmative relief which is inconsistent with objection to jurisdiction. Appellees here at no time asked for any affirmative relief. The only part they took in the proceeding at all, aside from the objecting to the jurisdiction and cross-examining the appellant's witnesses under the reserved right of objection, was to state, subject to such objection, that they would not take a review from the entry of an order, the form of which they approved, which order the referee had indicated he would make in any event. The cases cited by appellant do not involve anything but the rule, which appellees admit, that a collateral attack may not be made on a judgment which is merely voidable or erroneous. None of them hold that consent is given in the absence of an express intention to give

consent by affirmative action or failure to object, or that consent, when given, cures lack of jurisdiction of the subject matter. An examination of these cases indicates definitely only matters of error or personal jurisdiction where involved, such as defective service. It is also a fact that the case of *Burrough v. Burrough,* 10 Cal. App. (2d) 749, cited by appellant, expressly holds that, if the record shows lack of jurisdiction, it is subject to collateral attack.

In other words, consent may be given to procedural matters, and may cure error, but it cannot supply lack of jurisdiction. Consent to cure procedural matters or error must be explicit. Such consent is not to be found in the record of this case. The District Judge sets forth fully in his opinion his examination of the record in this connection and finds that there was no consent. [Tr. pp. 240 to 252.] Such finding of fact, in any event, is conclusive on this appeal, there being substantial evidence to support it. We, therefore, have a situation whereby the referee has exceeded his jurisdiction both by issuing the injunction after merely a summary hearing, which was not consented to, and assuming jurisdiction to exist in himself, as an officer of the District Court, which even the District Court did not have, and to which appellees did not consent. In this connection it should be noted that even the referee had doubts that he had the right to enter an order as broad in its prohibitions as that entered. Transcript, page 152, where the referee says:

> "I can say right now this Court will not attempt to prevent you from redrilling, but there is a certain course which this Court may prevent you from taking."

And again at page 156 of the transcript, where the referee says:

> "You may review any order this Court makes. I would welcome a review—but if I were going to be reviewed on a question of jurisdiction I would want to give serious consideration to the question."

There is no allegation of diversity of citizenship requisite to the general equity jurisdiction of the District Court. There is also no allegation of lack of an adequate remedy at law. In fact, the record shows the pendency of a civil action to recover damages [Tr. p. 43], brought by the appellant against one of the appellees. The injunction does not enjoin trespass upon or damage to the property of the bankrupt so as to bring the case within the bankruptcy jurisdiction. The injunction enjoins a stranger to the bankruptcy proceeding from doing a lawful act on his own property. It tells him how he shall drill an oil well on his own property. This is far beyond the contemplation of the Congress or the courts as being within the realm of what a referee in bankruptcy can do.

Inasmuch as the referee had no jurisdiction to make the order, even if the holding of the District Court upon the giving of the consent were not conclusive, and even if consent had been given, it could not confer jurisdiction under these circumstances. The rule is too plain to require citation of authority that the jurisdiction of a Court of the United States, as a Federal Court, cannot be waived. *Simpkins' Federal Practice,* 3d Ed., Sec. 30:

> "The jurisdiction of a Court of the United States as a federal court in the strict sense, viz., as regards jurisdictional amount, diversity of citizenship, and

federal question cannot be waived. Nor can the question of jurisdiction of the subject-matter be waived."

Nor can jurisdiction be conferred by consent. *Simpkins' Federal Practice,* 3d Ed., Sec. 31:

> "It follows from what has been said in the previous section that federal jurisdiction in the strict sense cannot be conferred by consent."

Similarly as to jurisdiction of the subject-matter, 21 *Corpus Juris Secundum* 127:

> "It is not within the power of litigants to invest a court with any jurisdiction or power not conferred on it by law, and accordingly, it is well established as a general rule that, where the court has not jurisdiction of the cause of action or subject-matter involved in a particular case, such jurisdiction cannot be conferred by consent, agreement, or other conduct of the parties. So, also, if the court cannot try the question except under particular conditions or when approached in a particular way, the law withholds jurisdiction unless such conditions exist or unless the court is approached in the manner provided, and consent will not avail to change the provisions of the law in this regard."

Just as the question of method of attack, raised by the appellant, upon examination is determined by the sole question involved in this proceeding—jurisdiction of the referee—so is the question of consent. If the referee had

jurisdiction of the subject-matter of this proceeding, then the injunctive order was valid regardless of consent, and the question of consent or collateral attack is not involved. If the referee did not have jurisdiction to make the order, no consent, even if given, could have rendered the order valid, and such order may be attacked either collaterally or directly.

In addition, even if it could be said that jurisdiction of the subject-matter existed, the appellees were entitled to a plenary suit in the District Court. And no consent was given to summary procedure.

For the foregoing reasons we respectfully submit that the order of the District Court should be affirmed.

Respectfully submitted,

EUGENE OVERTON,
WARREN S. PALLETTE,
DONALD H. FORD,
Attorneys for Appellees, Bolsa Chica Oil Corporation, Thos. W. Simmons, and Allan A. Anderson.